

**ATTORNEY GENERAL'S REPORT REGARDING JUNE 21, 2016  
OFFICER-INVOLVED SHOOTING INCIDENT IN  
PETERBOROUGH, NEW HAMPSHIRE**

---

**I. INTRODUCTION**

New Hampshire Attorney General Joseph A. Foster announces the completion of the investigation into the officer-involved shooting that occurred in Peterborough, New Hampshire, on June 21, 2016, that resulted in the death of Lane B. Lesko (age 19). The purpose of this report is to summarize the Attorney General's findings and conclusions with regard to this officer-involved deadly force incident. The findings and conclusions in this report are based on information gathered during the investigation, including viewing the scene of the incident, photographs, physical evidence, and witness interviews.

As provided in RSA 7:6, the Attorney General is the State's Chief Law Enforcement Officer. The Attorney General has the responsibility to ensure that whenever law enforcement officers use deadly force, it is done in conformity with the law. Following a full investigation of this deadly force incident by the Attorney General's Office, the Attorney General finds that Greenfield Police Chief Brian Giammarino's use of deadly force on June 21, 2016, was legally justified.

**II. SUMMARY OF THE FACTS**

On June 21, 2016, Lane Lesko committed an armed robbery using what appeared to be a handgun, to steal a BMW SUV during a test drive with a used car

salesperson.<sup>1</sup> A few days prior to committing that armed robbery, Lesko had left a residential adolescent therapeutic wilderness treatment program in Maine. Lesko stole a car in Maine and then made his way to New Hampshire where he stole two other cars: a tow truck in Milford and the BMW SUV from Nashua.

After Lesko stole the BMW, a BOLO (be on the lookout) police bulletin was broadcast announcing the robbery and the fact that Lesko was armed with a firearm/gun. Greenfield New Hampshire Police Chief Brian Giammarino spotted Lesko driving the stolen BMW in Greenfield and tried to get him to pull over. Lesko refused to stop and sped away with Giammarino in pursuit. As he fled, Lesko endangered other people on the road by driving at high speeds and passing other cars in the opposite lane on corners.

At about 10:20 a.m., Lesko passed the Sunnyfield Farm on Rte. 136/Greenfield Road in Peterborough. Just beyond the farm, a Peterborough police officer had placed spike strips in the road to try and stop Lesko.<sup>2</sup> As Lesko approached the spike strips he veered to the right to try to avoid them, but caught some of them and went off the road.

Lesko got out of the now-disabled BMW and stood by the passenger side door. Once out, he refused to obey orders from Chief Giammarino and two other police officers on the scene that were ordering Lesko to show them his hands and

---

<sup>1</sup> The handgun turned out to be a BB gun. A photograph of Lesko's BB gun is attached to this report.

<sup>2</sup> Spike strips are used by police officers to try and stop a moving vehicle by damaging its tires.

step away from the car.<sup>3</sup> Instead, Lesko began yelling at the officers to shoot him and kill him.

After continuing to refuse the officers' commands, Lesko reached into the stolen BMW and retrieved what appeared to be a black handgun and began firing it at the officers. Lesko's gun looked real to all the officers, although it sounded different than a typical firearm. That caused the officers to question whether it might have been a smaller caliber handgun and two of them to wonder if it could have been an Airsoft type gun.<sup>4</sup> Telling the difference was difficult under the circumstances due to the loud noise at the scene from Giammarino's police siren.

After Lesko armed himself, he walked away from the BMW and quickly moved toward Giammarino, who had his gun drawn. Lesko pointed his gun at Giammarino as he advanced on him, despite being told to drop the gun. Fearing for his life, and believing that Lesko's handgun was a "real" firearm, Giammarino fired four shots at Lesko, hitting him once and killing him.

After the incident, Lesko's gun was examined and determined to be a loaded BB pistol.

Lesko's history before the incident was significant for mental health issues and prior criminal offenses.

---

<sup>3</sup> In addition to Chief Giammarino and Peterborough Corporal Edsall, New Hampshire State Police Trooper Scott Tracy had arrived on scene as well.

<sup>4</sup> An Airsoft gun is a type of pellet gun that fires rubber projectiles. It is used in a game like paintball where participants try to shoot each other.

### **III. THE INVESTIGATION**

#### **A. Events Leading up to the Shooting**

Lane B. Lesko had been arrested in Ann Arbor, Michigan, on July 15, 2015, and charged with motor vehicle theft and first-degree home invasion while posing as an FBI agent.<sup>5</sup> He committed another crime while out on bail and eventually pled guilty to 1<sup>st</sup> degree home invasion and lying to a peace officer in February 2016. Lesko's sentencing was delayed to allow him to get mental health and substance abuse treatment with the hope of avoiding a prison sentence. Lesko had been diagnosed with mental health issues, including bipolar disorder.<sup>6</sup>

Lesko was originally scheduled to go to a treatment facility in Indiana, but switched to one in Maine. He entered the residential adolescent therapeutic wilderness treatment program at Summit Achievement in Stow, Maine. He went missing on June 19, 2016. That same day, a boat and pickup truck were reported stolen in the area. Lesko is believed to have stolen that pickup truck.

On June 20, 2016, Lesko stole a Dodge Charger during a test drive at the Berlin City Auto Group in Portland, Maine. Lesko drove that stolen car to Milford, New Hampshire. At around 2:00 a.m. on June 21, 2016, the Milford police responded to a report that Lesko had been harassing and threatening another

---

<sup>5</sup> Lesko had other prior offenses on his record as well.

<sup>6</sup> Per the American Psychiatric Association's DSM 5 (Diagnostic and Statistical Manual of Mental Disorders), bipolar disorder (formerly called manic-depressive disorder) is characterized by mood swings, which are sometimes very rapid, with episodes of mania, hypomania, and depression. Many people with the disorder return to a fully functional level in between those episodes. The lifetime risk of suicide for people with bipolar disorder is estimated to be 15 times that of the general population.

man. That man told the police that a man (Lesko) who had been driving a Dodge Charger had been circling him in a parking lot. Lesko behaved strangely and at one point parked next to the man and stared at him for 10 minutes. The man drove away but Lesko continued to follow him. The man eventually evaded Lesko but encountered him again later on. During that encounter, the man and a store clerk noticed that Lesko was wearing a gun on his right hip and heard Lesko yell, "I'm a Federal agent and I demand more respect."

Shortly after getting the report about Lesko harassing the man in Milford, a police officer spotted Lesko driving the stolen Dodge Charger. The officer pursued Lesko, who fled and avoided capture. However, the police spotted Lesko again a short time later. This time Lesko abandoned the stolen car on a dead-end street and fled on foot.

A few hours later, Lesko stole a tow truck from Kent's Service Station in Milford. At about 8:30 a.m., Lesko pulled into the Nashua Used Car Superstore in Nashua, New Hampshire, driving the stolen tow truck. Lesko told a female salesperson that he was from Michigan and worked for the government. He told her that he wanted to test drive a used BMW. Lesko said that his cell phone and wallet were in his Dodge Charger, which was being repaired at Kent's Service Station.<sup>7</sup> He told the salesperson that Kent's had loaned him their tow truck to use while his car was being repaired.

---

<sup>7</sup> Lesko's driver's license was actually under suspension.

Since Lesko did not have any identification with him, his request to test drive the used BMW was refused. Instead, the salesperson agreed to drive him back to Kent's so he could get his ID and then do a test drive.

The salesperson and Lesko got into the BMW and headed to Kent's Service Station. Along the way, Lesko asked to make a stop to use the bathroom. After that stop, they resumed their drive. A short time later, Lesko asked the salesperson to make another stop at a Subway. During that stop, he asked the salesperson if she knew what a "Chinese fire drill" was. She said she did not and Lesko asked her to switch seats so he could drive. The salesperson refused and started driving toward Kent's Service Station.

As the drive continued, Lesko told the salesperson that his wallet and ID were not at the garage and were probably at a police station. He told the salesperson that it was in her best interest to keep driving. He then pulled out what appeared to be a handgun. The salesperson described the gun as a black, semi-automatic handgun. Lesko put the gun on his left thigh and held it with his right hand, pointing it at the steering wheel as the salesperson continued to drive. A short time later, Lesko told her to pull into the parking lot at the Agway Store. Once parked, he asked the salesperson if she remembered the Chinese fire drill he talked about earlier and told her to get out of the car. After she got out, Lesko also tried to steal her purse. The salesperson managed to convince him to let her take it instead, and then he told her, "I'm really sorry. I'm going to need you to run."

She fled and called 911.<sup>8</sup> Her 911 call resulted in the BOLO being put out that the BMW had been stolen by a man with a gun.

The next time Lesko was spotted was when Greenfield Police Chief Brian Giammarino saw him driving the stolen BMW in Greenfield.

**B. Interviews with Eyewitnesses to the Shooting Incident**

New Hampshire State Police Major Crime Unit detectives interviewed over a dozen people during the course of the investigation. Most did not see the actual shooting incident and instead, just saw or heard some aspects of the incident.

There were five people who saw the shooting incident: two private citizens and three police officers. Their interviews are summarized below.

**Cynthia West**

On June 21, 2016, Cynthia West was driving to Peterborough on Greenfield Road/Rte. 136. She heard sirens and eventually saw a police car pursuing a black car with tinted windows. West pulled over and allowed those cars to pass her.

After she proceeded, she saw another police car with sirens on and pulled over to allow that car to pass. She began driving again and came upon the two police cars stopped further down the road, with the officers crouched down behind their cruisers with their guns drawn.

The black car was in the ditch on the right side of the road. The officers were shouting, telling the person inside the black car to get out. Then the black

---

<sup>8</sup> The female salesperson was terrified during the incident and extremely distressed when the police interviewed her afterward.

car's passenger door opened and Lane Lesko got out. He walked up onto the road very slowly holding a "thick" black colored pistol "military style." By "military style", West said she meant that Lesko was holding the pistol with both hands in front of him. Lesko "walked purposefully toward the officers" with the pistol pointed at them. The officer shouted directives at Lesko, but she could not recall what they were saying. West never heard Lesko say anything and then lost sight of him and heard 3 gunshots.

After the shots were fired, one officer went up to the black car and looked inside and then the officers went up to where Lesko was on the ground. One of the officers involved in the shooting came up to her and spoke to her. That officer was "visibly shaken," and asked her to please wait.

### **Alvin Van Cleave**

On June 21, 2016, Alvin Van Cleave was driving east on Greenfield Road/Rte. 136 heading out of Peterborough.<sup>9</sup> A police officer waved him over to the side of the road. That police officer then threw a spike strip into the road. About 2-3 seconds later, Van Cleave saw a black car coming the other way (west) towards Peterborough. That black car had a police car in pursuit behind it. The black car tried to avoid the spike strips and went off the road to the right into a ditch and came to a stop about 100 feet behind where Van Cleave was parked.

---

<sup>9</sup> Van Cleave had just had an eye exam. As part of that exam, he had had his eyes dilated and was wearing sunglasses to protect his eyes. He stated that his vision was not otherwise affected.

The police stopped and opened their doors. Chief Giammarino and Corporal Edsall drew their guns and got behind Giammarino's police cruiser. Van Cleave looked in his rear view mirror and heard the police tell Lane Lesko a few times to step out of his car, step away, and show them his hands. Lesko yelled something a couple of times at the officers, but Van Cleave could not make out what was said.<sup>10</sup> Then it looked like Lesko went back into the car and came out with something in his hands. Lesko was holding the item he had retrieved from the car with both hands out in front of him like a person holding a gun. Lesko appeared to be in a "defiant mood" at that point. Van Cleave heard two "light" sounds/pops. He was not sure if they were gunshots, the sounds made by a pellet gun, or a .22 caliber gun.

After hearing those sounds, Van Cleave saw Lesko move towards Chief Giammarino and Corporal Edsall, who were behind the cruiser. After that, Van Cleave heard at least two gunshots from the police officers' guns and saw Lesko fall face first onto the road in front of the police cruiser.

After the shooting, Van Cleave saw police officers at the scene consoling another police officer that was bent over, visibly upset, and appeared almost physically ill.

Van Cleave was in his car the entire time during the incident. He estimated that he was about 100 feet from where the shooting occurred and that the incident did not last very long from start to finish.

---

<sup>10</sup> Van Cleave said that his hearing is "not that good" and that he is supposed to have hearing aids.

## **Chief Brian Giammarino**

Greenfield Police Chief Brian Giammarino was on duty on June 21, 2016. He was wearing a full police uniform and was driving a marked police vehicle.

Chief Giammarino went out on patrol in the morning and then stopped in at the police department to do some administrative work at around 9:00 a.m. Giammarino left the department a short time later and drove toward Antrim. Along the way, he heard dispatch issue a BOLO broadcast. He pulled over and took notes as the dispatcher relayed information about a stolen black BMW with dealer plates. The BOLO also mentioned that a gun was involved.

After hearing the BOLO, Giammarino drove back toward Greenfield. As he drove through Greenfield he saw a car matching the description of the stolen BMW. Giammarino turned his cruiser around and as he did, the BMW accelerated away from him.

Giammarino pursued the BMW with his lights and siren on as the BMW accelerated through town on Rte. 131/Forest Road. Giammarino called in the pursuit and followed the BMW as it turned onto Rte. 136, toward Peterborough. The BMW accelerated to around 80 miles-per-hour and did not stop. It drove recklessly and passed other cars it came upon by going into the opposite lane on corners. A couple of times the BMW slowed down as if it might stop, but then accelerated again.

The pursuit continued on Rte. 136 toward Peterborough. Giammarino heard Peterborough Cpl. Craig Edsall on the radio say that he had “spikes.”<sup>11</sup> Giammarino told him to hurry because they were moving fast. A short time later, Giammarino saw Cpl. Edsall in the road laying out the spike strips. Giammarino hit his brakes to avoid the spikes and saw the BMW pull to the right to try to avoid them as well. It appeared to Giammarino that the BMW’s left rear tire caught the spike strips, and the BMW went off the road on the right. The BMW got stuck off the right side of the road.

Giammarino stopped his cruiser in the road with his lights and siren on, and took a position forward of the driver’s side door of his police cruiser. He could not see the driver of the stolen BMW, so he yelled at him to get out of the car and show him his hands. A truck was coming the other way, so Giammarino stepped away from his cruiser to wave the truck back and then returned to his spot outside his cruiser.

At that time, Giammarino saw Lane Lesko step out by the rear passenger side of the BMW. Giammarino had his gun drawn and was crouched by the driver side tire.<sup>12</sup> He told Lesko to show him his hands. Lesko did not comply and instead, moved back and forth. At that point, Giammarino could only see Lesko’s head. He heard Cpl. Edsall order Lesko to show his hands. Instead, Lesko poked his head out two or three times. Giammarino heard Lesko say “just kill me, just

---

<sup>11</sup> This was a reference to spike strips.

<sup>12</sup> Giammarino was carrying a Glock .40 caliber pistol.

shoot me,” or words like that and then saw Lesko holding a black handgun. Lesko pointed the gun at Giammarino and then he heard pop, pop sounds. Giammarino turned to Cpl. Edsall and asked, “What is it?” Cpl. Edsall shrugged indicating that he did not know.<sup>13</sup>

Lesko moved away from the back of the BMW, out towards the road and Giammarino. Lesko was moving quickly on the road as if he was trying to get around the cruiser at Giammarino. As Lesko got closer to Giammarino, he had his gun pointed at Giammarino and appeared to be firing it. At that point, Giammarino felt that he was out of options and fired at Lesko. He thought he fired three or four times.

Lesko dropped to the pavement about nine to ten yards away from Giammarino. The officers approached Lesko and could see that he was deceased. Cpl. Edsall kicked Lesko’s handgun away and Giammarino noticed that Lesko had a gun holster on his hip.

The handgun Lesko had looked real to Giammarino and Lesko also acted like the gun was real. Lesko seemed desperate and Giammarino thought he was going to kill them. Lesko never complied with his orders or lowered the gun. When Giammarino heard the “pop” sounds Lesko’s gun was making, he thought that Lesko had a .22 caliber gun.<sup>14</sup> Giammarino also said that he thought Lesko

---

<sup>13</sup> Giammarino explained that when he asked Cpl. Edsall that question he wanted to know what Lesko was firing.

<sup>14</sup> Giammarino also said that it was “loud” out at the scene because of the siren going.

was a bad shot, which explained why he did not see any bullet damage from Lesko's shots.

Giammarino never knew that Trooper Tracy was there at the scene with them until after the shots were fired. He never heard Trooper Tracy call out that the gun was an Airsoft.

Giammarino estimated that about three minutes passed from the time Lesko's car stopped to the time he was shot.

### **Corporal Craig Edsall**

Peterborough Police Corporal Craig Edsall was on duty on June 21, 2016. He was wearing a full police uniform and driving a marked police vehicle. At about 10:20 a.m., he heard Greenfield Police Chief Brian Giammarino on the radio announce that he was "behind that vehicle" and they were heading toward Peterborough. Edsall did not know what vehicle the Chief was referring to at the time because he had not heard the BOLO.

Edsall started driving toward Rte. 136/Greenfield Road. As he did that, he heard Giammarino say over the radio "he's running." Edsall also heard sirens in the background during that radio transmission.

When Edsall got out into Rte. 136, he stopped his police cruiser near Sunnyfield Farm, which is located at 197 Greenfield Road/Rte. 136 in Peterborough. Edsall parked his cruiser in the eastbound lane, blocking the lane. He began setting up spike strips in the other lane to try and stop the car that

Giammarino was pursuing. As he did that, he heard dispatch announce that the subject should be considered “armed and dangerous.”<sup>15</sup>

Shortly after the spike strips were deployed, Lesko’s stolen BMW appeared and drove over the spikes. Edsall got the spike strips out of the road to allow Giammarino to pass by. When Edsall looked back, he saw that Lesko’s car was off on the side of the road.

Edsall ran up to the rear of Giammarino’s cruiser to use it for cover. The cruiser was parked about 15 to 20 yards from Lesko’s car. Edsall saw Lesko standing outside the passenger door of his car. Edsall had his gun drawn and repeatedly yelled at Lesko to put his hands up. Lesko responded in a loud voice saying, “kill me, shoot me, kill me,” over and over again. As he did that, Lesko jerked back and forth toward Edsall as if he was going to run at him. Then, Lesko started to quickly put his arms up and down, while yelling, “kill me, shoot me,” very fast.

Edsall heard the voice of New Hampshire State Trooper Scott Tracy tell Lesko over his public address (PA) system to put his hands up. Edsall had not realized that Trooper Tracy was there until he heard his voice over the PA.

Instead of putting his hands up, Lesko started putting his hands into the BMW and pulling them back out. Initially, Edsall did not see anything in Lesko’s

---

<sup>15</sup> Hillsborough County Dispatch had put out a broadcast about a suspect driving a stolen BMW who was “armed” and last seen in Milford at 9:50 a.m. During the pursuit, dispatch reminded the officers that the suspect was to be “considered armed and dangerous, again, armed and dangerous.” NH State Police dispatch had broadcast an advisory at 10:12 a.m. that morning telling police officers to be on the lookout for a suspect who was “armed” driving a stolen black 2011 BMW X6 with dealer plates on it. The BOLO advised officers that the suspect was last seen driving eastbound on Rte. 101A in Milford at 9:50 a.m.

hands. Then, Lesko put his hands into the BMW and came back out holding a black handgun. At that point, Edsall heard popping sounds and ducked as Lesko began firing indiscriminately in Trooper Tracy's direction. Edsall could not see any muzzle flash or smoke from Lesko's gun. He described the sounds it made as possibly like a .22 caliber handgun and then heard Trooper Tracy yell, "It's Airsoft!"

Edsall saw Lesko step away from his car, in what Edsall thought was Lesko's attempt to get a better shot at him. Edsall crouched down and as he did that, heard Giammarino ask if Lesko was shooting at them. Edsall replied that he thought so, but he did not know.

Edsall peeked out from behind the cruiser and could see that Lesko was no longer near the BMW. At that point, Edsall heard several gunshots. He saw Lesko lying on the road in front of the cruiser. As Edsall approached Lesko, he could see that Lesko was deceased. There was a black handgun about a foot and a half away from Lesko. Edsall kicked it away. Giammarino was very emotional and Edsall told him that Lesko "made us, he made us do that."

Edsall said that during the incident Lesko never complied with Edsall's orders and "kept upping the tension and the situation" and seemed to be trying to goad Edsall into shooting him. Edsall also said that Lesko's handgun looked "real" to him and that he believed that Lesko was trying to shoot them. Edsall did not shoot Lesko because of the distance involved and because he thought something was "off" and did not feel right. However, Edsall confirmed that he

was “scared to death” and that he never felt it was safe to utilize a “less than lethal option.” Edsall confirmed that if Lesko had moved toward him, he would have shot him.

### **Trooper Scott Tracy**

On June 21, 2016, New Hampshire State Trooper Scott Tracy had been on duty and arrived home at around 10:00 a.m. As he did so, he heard a BOLO broadcast about a person driving a stolen black BMW SUV from a Nashua car dealership. The BOLO also indicated that the stolen BMW was last seen on Rte. 101A heading eastbound and that a firearm was involved.

Tracy shut off his cruiser and went into his house. Once inside, he heard a police siren go by. Tracy knew that Chief Brian Giammarino was working that day and upon hearing the siren and considering the BOLO, he felt something was not “right.” Tracy ran back out to his cruiser, got in, started it up, and turned on his lights.

Tracy drove from his home to Rte. 136 and quickly headed towards Peterborough. He heard Giammarino announce his location over the radio and eventually caught up to him on Rte. 136. Tracy saw Giammarino was behind a black colored SUV. As he drove over a rise, Tracy saw a Peterborough police cruiser and Giammarino’s cruiser stopped in the road. He could also see the black colored BMW SUV stopped on the right side of the road ahead of Giammarino’s cruiser.

Tracy pulled up to the scene and parked his cruiser about ninety feet from the BMW. He saw Lane Lesko standing outside the BMW on the passenger side. Tracy got out of his cruiser and saw Giammarino near his driver's side door with Corporal Edsall at the rear of the cruiser.

Even though Giammarino's siren was on, he could still hear Giammarino and Edsall yelling at Lesko, giving him commands to show them his hands. Tracy got on his PA system and told Lesko to step away from the car and show them his hands. Tracy heard Lesko yelling at them and could not make out what he was saying except something to the effect of, just shoot me.

Lesko squatted down and started looking left and right. Then he ducked inside the BMW and came out holding a handgun. In response, Tracy moved to the back of his cruiser and got his rifle out. Lesko pointed the handgun at Giammarino and fired it twice. Then, Lesko looked at Tracy, who had his rifle trained on him. Lesko pointed his gun at Tracy and fired at him. Tracy said that the gun did not sound like a firearm to him. It sounded muffled, like possibly a .22 caliber or like his son's CO<sub>2</sub> BB gun. The projectile that went by Tracy also did not sound like a bullet to him. Tracy believed that the gun was an Airsoft gun and, in fact, yelled that Lesko had an Airsoft gun.<sup>16</sup> Tracy did not see Giammarino

---

<sup>16</sup> It turned out that the gun was a BB gun (fires metal projectiles) and not an Airsoft gun (fires rubber projectiles).

or Edsall respond or acknowledge that they had heard him. Given the noise from Giammarino's cruiser siren, he did not know if they could have even heard him.<sup>17</sup>

Tracy saw Lesko move to the front of the BMW and raise his gun up at Giammarino. Somebody yelled drop the gun, but Lesko did not drop the gun. Lesko moved directly in front of the cruiser and appeared to be trying to go around the front of it toward Giammarino. Giammarino fired his gun 4 times at Lesko and Lesko fell to the ground.

Tracy approached Lesko and based on his prior training as a military medic he could tell that Lesko was dead. Tracy could also see that Lesko was wearing an empty black nylon gun holster on his hip. Edsall kicked the black handgun away that was near Lesko.

Giammarino was extremely upset and shaken up after the shooting. Tracy tried to calm him down. Tracy did not believe that Giammarino realized that Tracy was there at the scene with them until then.

Tracy estimated that the whole event lasted less than a minute. He described Lesko as "noncompliant", agitated and almost "aggressive" throughout the incident. Tracy confirmed that Lesko's handgun looked "real" to him.

### **C. Lane Lesko's Injuries**

The State's Chief Medical Examiner, Dr. Thomas A. Andrew, completed an autopsy on Lane Lesko on June 22, 2016. Dr. Andrew determined that Lesko's

---

<sup>17</sup> Tracy was not using his PA system at that time since he had moved to the rear of his cruiser to get his rifle.

cause of death was a single gunshot wound to the neck. The manner of death was homicide, which is a medical term meaning that the death was caused by another person. Toxicology testing on a sample of Lesko's blood is still pending.

**D. Physical Evidence**

The relevant physical evidence collected at the scene consisted of four discharged cartridge casings. Those were consistent with the 4 shots fired from Chief Giammarino's handgun.

A black Umarex XBG BB gun was also recovered at the scene, a few feet from Lane Lesko's body.<sup>18</sup> The safety on that BB gun was in the "fire" position.<sup>19</sup> That gun had a magazine with 16 metal BBs in it. The magazine could hold 19 BBs when full. The absence of 3 BBs from the magazine is consistent with the 3 shots Trooper Tracy said that Lesko fired at him and the other officers. Lesko was also wearing a black, nylon gun holster on his hip.

**E. Potential Video and Camera Evidence**

Cynthia West showed the investigators a video recording she made on her cell phone. The video did not capture any of the events before or during the shooting and just showed some of the scene after the incident had already occurred.<sup>20</sup>

---

<sup>18</sup> Corporal Edsall stated that the BB gun had originally been about a foot and a half away from Lane Lesko's body before he kicked it away.

<sup>19</sup> The investigators have been unable to determine where Lesko got the BB gun.

<sup>20</sup> Some private citizens at the scene also took pictures, which the investigators viewed. However, those were all taken after the incident from some distance away.

None of the police officers involved in this incident were wearing body cameras.

Trooper Tracy's State Police cruiser had a video recording unit in it with a forward facing camera. When that recording unit was reviewed on the day of the incident to see if it captured any footage of the incident, the screen was blank even though the unit appeared to have data on it.

Trooper Tracy believed that the video recording unit may not have recorded the incident because he started his cruiser and turned on his emergency lights so quickly that the unit may not have had time to "boot up" properly.<sup>21</sup> The equipment had made a "beep" when Trooper Tracy turned on his cruiser, which he silenced by hitting a switch. That had been Tracy's habit over the past 3 months while using a spare cruiser that had an issue with its video recording unit turning on when it should not have.<sup>22</sup> Tracy understood that even though he silenced the unit it should still have been recording.

In an effort to try to extract any video footage of the incident, a technician employed by the unit's manufacturer, WatchGuard Video, examined it on June 23, 2016. That technician confirmed that the unit had some data on it, but he could not extract any video footage. At the State's request, the technician removed the video recording unit's hard drive. That unit was then shipped overnight to

---

<sup>21</sup> This was the first time Tracy had got into his cruiser and activated his lights so quickly like that without allowing the video equipment to boot up.

<sup>22</sup> June 21, 2016 was Tracy's first day back with his old cruiser. He had given up the spare cruiser that day.

WatchGuard Video in Texas so the manufacturer could examine it further and try to extract any possible video footage of the incident.

WatchGuard's engineers examined the video unit's hard drive on an expedited basis. On July 7, 2016, they notified the State that no video footage of the incident was available. The failure to record was due to a system malfunction, which had been addressed about two years ago after WatchGuard released a system firmware update.<sup>23</sup> According to WatchGuard's engineers, there is a "bug" in the older version of the firmware that was used on Trooper Tracy's video recording unit. That firmware "bug" could cause a problem resulting in the unit's failure to record an event, which is what occurred here. According to the engineers, the malfunction was not due to anything Trooper Tracy did and everything would have looked fine to him.

#### **IV. APPLICABLE LAW AND LEGAL STANDARDS**

New Hampshire's laws regarding self-defense, defense of others and the use of physical force by law enforcement are set forth in RSA Chapter 627. Under RSA 627:5, II (a), a law enforcement officer, like a private citizen, is justified in using deadly force when he reasonably believes that such force is necessary to defend himself or a third person from what he reasonably believes is the imminent use of deadly force. Under RSA 627:9, II, "deadly force" is defined as any assault which the actor commits with the purpose of causing or which he knows to create

---

<sup>23</sup> Trooper Tracy's video recording unit had the old version of the firmware on it, not the updated version that was required to fix the "bug" in the system.

a substantial risk of causing death or serious bodily injury. Purposely firing a weapon capable of causing serious bodily injury or death in the direction of another person constitutes deadly force.

The phrase “reasonably believes” means that the actor “need not have been confronted with actual deadly peril, as long as he could reasonably believe the danger to be real.” State v. Gorham, 120 N.H. 162, 163-64 (1980). The term “reasonable” “is determined by an objective standard.” State v. Leaf, 137 N.H. 97, 99 (1993). Further, all the circumstances surrounding the incident should be considered in determining whether there was a reasonable belief that deadly force was necessary to defend oneself or another. See id. at 99; Aldrich v. Wright, 53 N.H. 398 (1873). The reasonableness standard also applies in a situation where a person who uses deadly force is mistaken about the situation or the necessity of using deadly force. Thus, either a private citizen or a police officer may still be justified in using deadly force if he reasonably believed that he was in imminent danger from the use of deadly force by another even if, in fact, they were not, so long as the actor’s belief was objectively reasonable.

Moreover, when analyzing the reasonableness of an actor’s use of deadly force, the inquiry must focus on the situation from the standpoint of a reasonable person facing the same situation. That examination cannot be made with the benefit of hindsight, which is afforded by one viewing the circumstances after the fact.

In Graham v. Connor, 490 U.S. 386 (1989), the United States Supreme Court discussed the standards by which a police officer's conduct would be judged when excessive force claims were brought against him. The Court confirmed that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. The Court went on to explain how to determine what is reasonable in situations where police officers use force:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97; see also Ryburn v. Huff, 132 S. Ct. 987, 992 (2010).

The Eleventh Federal Circuit has noted that:

The Supreme Court has emphasized that there is no precise test or 'magical on/off switch' to determine when an officer is justified in using excessive or deadly force. ... Nor must every situation satisfy certain preconditions before deadly force can be used ... Rather, the particular facts of each case must be analyzed to determine whether the force used was justified under the totality of the circumstances.

Garczynski v. Bradshaw, 573 F.3d 1158, 1166 (11<sup>th</sup> Cir. 2009) (citations omitted).

That is because "the law does not require perfection – it requires objective reasonableness." Phillips v. Bradshaw, 2013 U.S. Dist. LEXIS 44646 \*55-56 (S. Dist. Fl. 2013). Specifically, the law accounts for the often fast moving nature of dangerous situations and the necessity of making decisions in less than ideal circumstances. See Ryburn v. Huff, 132 S. Ct. 987, 991-92 (2012) (chastising the

lower circuit court for not “heed[ing] the District Court’s wise admonition that judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation.”).

## **V. ANALYSIS AND CONCLUSION**

Based on all the facts and circumstances of this case, the Attorney General has concluded that Lane B. Lesko created a dangerous situation, which he escalated to the point where it became reasonable for Chief Brian Giammarino to conclude that he faced an imminent threat of deadly force from Lesko.

Lesko had committed a series of crimes since leaving the Summit Achievement treatment program in Maine. It is believed that he stole at least four cars after he left, the last using what appeared to be a handgun. Not long after Lesko stole the last car using a gun, Giammarino spotted him driving that stolen BMW and tried to get him to stop. Instead of stopping, Lesko fled and endangered others by driving at speeds of up to 80 miles per hour on a rural road and passing other cars on corners. The chase only ended because Lesko ran off the road after he hit a spike strip and the stolen car was disabled.

After Lesko’s stolen car was disabled off the side of the road, he refused all the police officers’ commands and asked the officers to shoot him. The situation became even more dangerous when Lesko armed himself with what appeared to be a handgun. The fact that Lesko armed himself was consistent with the BOLO the officers had heard earlier warning that Lesko had used a firearm/gun to steal a car. The situation at that point was a “tense, uncertain and rapidly evolving

situation,” exactly the type of scenario that the Graham Court determined can often require officers to make split-second decisions about the use of force.

All three police officers issued commands to Lesko, which he refused to comply with. Instead, Lesko escalated the situation even further by aiming his gun at the officers and firing it at them. All three officers said that Lesko’s handgun looked “real” to them, although it sounded different and two of them thought it could be a pellet gun at the time. The officers also agreed that Lesko behaved as if the handgun he was firing at the officers was “real.”

After firing his gun, Lesko’s conduct became even more threatening. He walked away from the stolen car, and started moving closer to the officers. Then, despite being told to drop the gun, Lesko quickly walked toward Giammarino with his handgun aimed at him. That prompted Giammarino to shoot Lesko.

The fact that Chief Giammarino believed Lesko’s gun was a real firearm (even though it later turned out to be a BB gun) was reasonable, based on all the facts and circumstances known to Giammarino at the time he decided to use deadly force. Shortly before encountering Lesko, Giammarino heard the BOLO announcing that Lesko had committed a robbery involving a firearm. When Giammarino spotted Lesko, Lesko fled instead of stopping. The fact that Lesko fled, drove recklessly and put others at risk was consistent with the BOLO information that Lesko had committed a serious crime and was trying to avoid capture.

Once Lesko was on the side of the road, he refused repeated commands and armed himself with a gun that looked like a real firearm based on its color, size and appearance. Lesko behaved as if his gun was real and a deadly weapon, using it in a threatening manner and firing it at the police officers.<sup>24</sup> Lesko continued to act as if his gun was real by pointing it at the officers as he advanced on them, even though the officers had their guns drawn and pointed at him. While Lesko's gun sounded "different" when fired, Giammarino reasonably believed that it was a smaller caliber firearm and/or the sound was partially obscured by his police cruiser's loud siren. Therefore, based on all the facts and circumstances known to Chief Giammarino at the time he encountered Lesko, it was reasonable for Giammarino to conclude that Lesko's gun was a real firearm and that Lesko was about to use deadly force against him.

As far as Lesko's motive that day, he probably knew that his series of crimes over the prior two days would almost surely result in him going to prison. The knowledge that he faced certain prison time may have motivated Lesko to take extreme measures to avoid capture by the police. His mental health issues may have also influenced Lesko's behavior and judgment that day. However, none of the police officers at the scene knew about Lesko's mental health issues at

---

<sup>24</sup> NH law defines a "deadly weapon" as "any firearm, knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury." RSA 625:11, V. Here, Lesko's BB gun met the legal definition of a "deadly weapon" based on the manner in which he used it and threatened to use it at the time of the incident. In addition, the Medical Examiner's Office confirmed that a BB gun can, in fact, cause death or serious bodily injury.

the time of the incident and even if they had, it would not have changed the fact that Lesko presented an apparent imminent threat of deadly force.

Accordingly, Chief Giammarino was legally justified in using deadly force against Lane B. Lesko. Therefore, no criminal charges will be filed against Giammarino as a result of Lesko's death.

[1443060]